times. Credibility is terribly important. If you are dogmatic, and I don't mean to say anyone in particular is that, on anything that looks like long distance you object I think you neutralize your own ability where you have credible arguments; so, we at QWEST have been very careful here and we have studied this one. We believe 271 has to be enforced. That doesn't mean there aren't other things in this Act that a reasonable person could see themselves through allowing the BOCs to do and this area of marketing was one very specifically, I believe, debated at the time the Act was formed and language that was in the MFJ which precluded RBOCs from marketing with unaffiliated **[end of side 1; remainder of answer, if any, lost].**

[Beginning of side 2 lost]

[UNKNOWN VOICE]: Can you kind of clarify it for me **[unintelligible]**

NACCHIO: **[unintelligible]** Who, who? Where am I quoted in saying that I am disinterested . . . .

QUESTION: **[unintelligible]** In the *WALL STREET JOURNAL*.

NACCHIO: Oh, really. You know how Journals start. I don't remember seeing it in our edition, and I can tell you I didn't say it. Let me come back to the second part of your question now. Today we are separate companies and it is required that we independently market and independently make strategy decisions, given that we are separate entities. I cannot prior to going public develop a joint marketing strategy or even a joint business development strategy with LCI. It has to be arm's length and we are in the process of doing it. Now, I brought them the knowledge of this yesterday, once our arrangement was consummated. If Keller or whoever wrote the *Journal* reported it that way, I don't remember saying it. What I did say was, when asked, which was like the question prior to this one, that I did speak yesterday with Anne Bingaman and with Brian, clearly they were not in the loop because they couldn't be, they understood why we were doing it. This was not a question of LCI doing it. This was a question of QWEST doing it. They presumably independently might have had a different judgment on it, but when we finished talking yesterday they fully understood, and were fully supportive and again as I expressed a moment ago and what I expressed to them we are supporting the 271 issues and we are looking at new and creative ways to grow the business. That's no criticism of anyone else, it's simply that we're independent entities and we cannot make those decisions jointly until this merger is consummated.

TODD: But that notwithstanding, after explaining to them what it is you guys were doing, the LCI Board or Brian Thompson or whoever supported your strategy.

NACCHIO: Oh, yes, oh, yes. As a matter of fact, I even asked Anne to help think through this issue since she's the expert in it. I wanted to be sure that today it isn't misinterpreted that we either don't agree with LCI, if I could use that term, on 271. We are in full agreement and most importantly I want it to be understood that we are distinctively at odds with the Bells on their positions on 271. But all being said that doesn't mean they don't have the ability to do what U S WEST is attempting to and I would just point out, there are a lot of long distance carriers who tried to get this position and didn't on the first wave here in terms of bidding on it so to speak and they must think they can do it also.

TODD: Right. The other thing that I wanted to just clarify, if you don't mind, again is somewhat the way the press reports these things, but this is an issue that was debated actively when they passed the Telecom Act. This is not going to catch the FCC by surprise and somebody's going to say "oh, there's a loophole we forgot to close."

NACCHIO: That's right.

TODD: Is that true?

NACCHIO: That is true, and I think at least I understand it to be true because that language as I remember was a debatable issue and U S WEST yesterday before this all was announced briefed both the Justice Department and the FCC and I have my own people in there this morning making sure they understand our position clearly just as we're trying to clarify it with you on how we have read it and why we believed we could participate. Actually at the end of the day I didn't need to defend this. This is a U S WEST offering. It's really their, but I am just saying why we believed they could and therefore we participated and certainly we wanted to make sure they understood our continued concerns on 271.

TODD: OK. Thanks a lot.

NACCHIO: Sure.

LEE: Noreen, I think we have time for one more question.

OPERATOR: Your next question is a follow up question from Amos Marone. Please proceed with your question.

AMOS: Hi. Just a quick follow up on the question on the relationship with LCI and the means of communicating this

transaction to them. I'm just curious again in response to the comments in today's *Journal* to what extent once you filled them in on the transaction what their response was and how this will play in with merger integration issues in general going forward.

NACCHIO: First of all, this is a big move and so I called them and explained it and of course they wanted to chew on it and give me some guidance. Our merger integration efforts in terms of how we're working together are about as good as I've ever seen. As a matter of fact, Brian and I are meeting tonight in Ohio where he has his network operations and IS forces. He's meeting me with his senior guys, Joe Lawrence and Larry Bowman, and I'm going East with my network and IS folks Larry Seese and [**name not intelligible**.] They have been working extremely well and we're going to continue to move that process along. You know Brian announced his quarterly meeting he expected to share on or about June 5. We announced the same thing. We have tried to keep people apprised of how well it's going and we're very confident this will go forth. There is nothing. I sense the nature of your questions, given what I didn't even realize was in the *Journal* because I didn't say it but, is that there's tension between us. That's just not the case. I have been in the middle of many mergers and this has gone as well as any I've seen. Brian and his team have been completely forthright, standup. Now that's not to say we agree on everything. That would be "Pollyannaish," but you get bumps in the road, but you got to look beyond those kinds of things, as we've been doing.

LEE: OK. Thank you very much. We appreciate your participation with us on the call today.

NACCHIO: Yes. Again, thanks very much for the interest. If there are follow up questions you have, you can always get back to Lee. We'll be happy to answer them for you.

OPERATOR: Ladies and gentlemen, that does conclude your conference call for today. Thank you for participating and we ask that you please disconnect your lines.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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RECEIVED

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants.

Civil Action No. 82-0192

FILED

APR 11 1985

JAMES F. DAVEY, Clerk

MEMORANDUM ORDER

On October 19, 1984, the Department of Justice filed an enforcement petition seeking an order to compel Southwestern Bell Corporation and Southwestern Telecommunications Company, a wholly-owned subsidy of Southwestern Bell, to comply with the decree and to cease the provision of telecommunications equipment in violation of section II(D)(2) of the decree.[1/] Specifically, the Department alleged that Southwestern leased a PBX to National Telecommunications, a reseller of interexchange services, along with maintenance and support services, and that Southwestern also

1/ This petition was filed in response to a complaint received by the Department of Justice.

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provided National with an "endorsement of quality" for the latter's use in marketing its interexchange services.[2/]

Southwestern, in fact, concedes that it sold telecommunications equipment to National, that National is a "carrier" under section IV(D) of the decree, and that it provided National with an endorsement of quality -- the actions alleged to violate the decree.[3/] Indeed, prior to the filing of the Department's petition, Southwestern agreed to disassociate itself from all aspects of the lease agreement with National and to terminate any arrangements for the provision of telecommunications equipment, including switches, to resellers of inter-LATA MTS, WATS, MTS/WATS-type, and private line services to off-premise users.

Section II(D)(2) of the decree provides that no Operating Company shall provide telecommunications products. While the decree permits these companies to market customer premises

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2/ The "endorsement of quality" provides that

> National Telecommunications of Austin is a new discount long distance company serving the Austin free-calling area. With National, every call you make is handled by switching equipment provided and maintained by Southwestern Bell Telecom. Then, your call is transmitted over the Southwestern Bell Telephone Company and AT&T Communications network system. This system is completely compatible with the system National Telecommunications is utilizing.

3/ However, Southwestern denies that these actions constitute a violation.

equipment (CPE), equipment provided to carriers for the provision of telecommunications services is specifically excluded from the definition of CPE. Thus, section IV(N) defines "telecommunications equipment" as "equipment, other than customer premises equipment, used by a carrier to provide telecommunications services" (emphasis supplied), and section IV(E) defines "CPE" as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications . . ." (emphasis supplied).

It is clear, therefore, that Southwestern's provision of switching equipment to National violates section II(D)(2) of the decree. Moreover, by granting to National an endorsement of quality, Southwestern Bell has violated the non-discrimination provision of section II(B) of the decree.[4/] Accordingly, the Department's motion to compel compliance will be granted.

II

Largely in response to the Department's petition, Ameritech filed its own motion for clarification, in which it seeks an order permitting the Operating Companies to market CPE to all customers, including carriers and resellers of telecommunications

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4/ None of the Operating Companies which filed responses to the Department's motion, including Southwestern, has contested the charge that an Operating Company's endorsement of services of an interexchange carrier is prohibited under the decree.

services.[5/] In support of its motion, Ameritech alleges that in many instances the switches used by customers as PBXs are identical to and interchangeable with those used by carriers and resellers. On that basis, it argues that the Department's customer-based distinction for determining whether equipment is CPE (which the Operating Companies may market) or telecommunications equipment (which they may not market) is artificial and would impose upon the Operating Companies the "impossible burden" of ascertaining a customer's intended use of the equipment. Moreover, because a significant number of purchasers of large switches might be deemed "carriers" or "resellers," the Operating Companies would be ousted from a substantial portion of the CPE market. Finally, Ameritech argues that neither the risk of anticompetitive conduct nor the potential for procompetitive gain from the Operating Companies' marketing activities depend upon the identity of the customer or that customer's intended use of the equipment.

The Court rejects Ameritech's arguments, and it denies the Ameritech motion. Section II(D) clearly prohibits the sale of switching equipment to carriers, and the Court will enforce that section as it enforces all other provisions of the decree. To be

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5/ Bell South, Bell Atlantic, Southwestern Bell, Pacific Telesis, and U S West have all filed memoranda supporting Ameritech's motion, arguing that any limitation on the Operating Companies' equipment marketing activities should be based upon the nature of the equipment sold and not the use to which the customer or carrier intends to put such equipment.

sure, by their very definition, the terms "CPE" and "telecommunications equipment" may describe the same or similar equipment depending upon the identity of the purchaser, that purchaser's intended use, or both.[6/] This raises some problems, but these problems are not to be resolved by construing out of existence a significant part of the decree.

In any event, some of these problems are more imaginary than real and others will become ripe only when they can be examined in their particular factual context.

In the first category is the Operating Companies' professed belief that, under the Department's -- and now the Court's -- interpretation of the decree, they will no longer be permitted to market equipment to firms which resell the excess portion of their switching capacity to others -- customers which apparently make up a substantial, not to mention profitable, portion of the CPE market.[7/] That is not correct. An Operating Company may continue to provide PBX equipment to carriers to be used on the

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6/ Although the Department states that switches used by long-distance carriers are configured differently than switches used to provide PBX functions, the Operating Companies maintain that the switches used by interexchange carriers do not contain unique software or other features. To the contrary, they claim that many of their large business customers use software that is similar to and hardware that is identical to that used by the interexchange carriers. See Ameritech Reply Memorandum at 3 n.*, Bell Atlantic Reply Memorandum at 1-2.

7/ Examples of larger customers which resell telephone services to others on the same premises are hospitals, hotels, universities, industrial parks, and lessors of multi-tenant buildings.

carrier's premises for internal or non-carriers uses, and it may market equipment to resellers provided that it reasonably believes that the switching system will be used, at least in substantial part, as a PBX.[8/]

On the other hand, to the extent that the Operating Companies wish to market CPE to carriers for use in interexchange functions, what they seek is not a clarification of the decree, but a modification. The proper procedure for obtaining such a modification is the waiver process established pursuant to section VIII(C) of the decree. Absent a waiver, the decree is clear: the Operating Companies are prohibited from marketing telecommunications equipment to carriers.

Finally, other issues, as noted, will require some factual inquiry and resolution, and there will be time enough to consider them once they are presented in a concrete factual context[9/] -- not in the context of a wide-ranging motion such as Ameritech's.

8/ What an Operating Company may not do is to sell telecommunications equipment to carriers or resellers which it has reason to know will be used for the performance of interexchange functions.

9/ It appears that the Department of Justice has begun to investigate some of the issues raised by the Ameritech motion. For example, the Department concedes that the use of CENTREX services, which is currently provided to carriers, can be used as a substitute for a PBX, and that this may present an added complication to the CPE-telecommunications equipment issue. Pursuant to its investigation of this problem, the Department has requested information from the Operating Companies concerning the provision of CENTREX services to carriers.

For the reasons stated, it is this 11th day of April, 1985

ORDERED that the petition filed by the United States for an order pursuant to section VII of the decree to compel Southwestern Bell Telecommunications, Inc. to comply with section II(D)(2) of the decree be and it is hereby granted; and it is further

ORDERED that Southwestern shall, within thirty days of the entry of this Order, disassociate itself from all aspects of the lease agreement with National Telecommunications of Austin, Texas, including the assignment of its beneficial interest in the lease, and its obligations to repair, maintain or install any equipment subject to that lease; and it is further

ORDERED that Southwestern shall, within thirty days of this Order, review the circumstances surrounding the negotiation and execution of the lease agreement with National Telecom, and provide to the Department of Justice a report of its findings, and a statement of the measures it intends to take to insure that Southwestern remains in compliance with the decree; and it is further

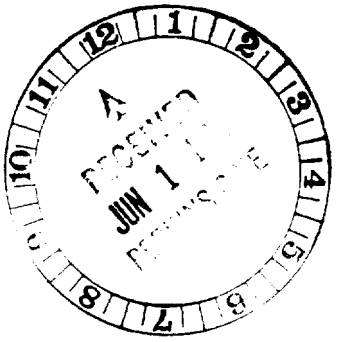
ORDERED that Southwestern shall, within thirty days of this Order, terminate any arrangements for the provision of telecommunications equipment, including switches, to resellers, such as National Telecom, of inter-LATA MTS, WATS, MTS/WATS-type, and private line services to off-premise users; and it is further

ORDERED that the motion of Ameritech for clarification regarding the sale of CPE to carriers be and it is hereby denied.

HAROLD H. GREENE
United States District Judge

ATTACHMENT 2

The Honorable William L. Dwyer



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AT&T CORP., MCI TELECOMMUNICATIONS CORPORATION, ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, McLEOD USA TELECOMMUNICATIONS SERVICES, INC., ICG COMMUNICATIONS, INC., GST TELECOM, INC., Plaintiffs, v. U S WEST COMMUNICATIONS, INC., Defendant.	No. C98-634 WD REPLY MEMORANDUM OF AT&T CORP. IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION[1]

[1] MCI Telecommunications Corp. ("MCI"), the Association for Local Telecommunications Services ("ALTS"), McLeodUSA Telecommunications Services, Inc. ("McLeod"), ICG Communications, Inc. ("ICG"), and GST Telecom, Inc. ("GST") hereby join and support this memorandum of points and authorities.

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The events since the filing of this lawsuit have vividly confirmed that AT&T and the other plaintiffs are entitled to a preliminary injunction requiring U S WEST to cease the long distance marketing and related activities that it is performing under its contract with Qwest. Indeed, while the main points made in AT&T's motion have been confirmed by the deposition testimony of U S WEST's and Qwest's officers, the contracts, marketing scripts, affidavits, and other exhibits to U S WEST's opposition have themselves demonstrated that U S WEST is violating the law, that these violations are irreparably harming plaintiffs and the public interest, and that U S WEST and Qwest will suffer no cognizable harm by an injunction that preserves the status quo ante pending this Court's final decision. Beyond that, while U S WEST's assertions that the FCC has authorized these activities are irrelevant, erroneous, and contrary to U S WEST's own prior statements, FCC officials have now publicly rejected U S WEST's claims. It is perhaps for these reasons that U S WEST's opposition is principally devoted to the startling claims that this Court cannot or should not enforce the requirements of the Communications Act.

THE CRITICAL FACTS ARE UNDISPUTED

Despite the voluminous length of the parties' filings, the material facts are relatively simple and are undisputed. Indeed, they are established by U S WEST's own opposition and deposition testimony.

First, U S WEST is marketing the long distance services of Qwest and performing related "customer care" functions. U S WEST's own marketing scripts state (correctly) that U S WEST is "providing" long distance services and tell customers that they are making a "great choice" if they select this long distance service. U S WEST is performing these activities not only through targeted "outbound" telemarketing but also through the "inbound" telemarketing channel that all customers must use to establish service, change service, and ask questions, and that had been

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scrupulously neutral in all matters of long distance carrier selection for the last 14 years. U S WEST further states that it will perform these marketing and other services only for those long distance carriers who satisfy certain criteria that U S WEST has established and who allow U S WEST to market the long distance service as part of a package that includes its own services. In addition, after initially requiring Qwest to pay a flat fee for each customer U S WEST chooses to sign up plus an additional amount based on the revenues Qwest derived from these customers, U S WEST has now required higher payments per customer, eliminated the additional payments, and preserved its own complete discretion to decide whether and to what extent it will market Qwest's services. Each of the foregoing facts independently establishes that U S WEST is "providing interLATA services" in violation of § 271.

Further, the contract provides -- and the responsible U S WEST executive has testified -- that it will only market long distance service as part of a package that includes not only the U S WEST local services that are monopolies but also certain other U S WEST telecommunications services that it offers in other segments of the industry in which U S WEST has lost substantial amounts of business to AT&T, MCI, and other carriers (but not to Qwest). The marketing scripts demonstrate that the "Buyers' Advantage Program" is designed both to "win back" customers that have been lost to AT&T, MCI, and other long distance carriers and to prevent further competitive losses. In this regard, the responsible U S WEST executive has testified that it markets this package of services by using competitively critical information that U S WEST has because of its local monopoly and that U S WEST does not provide to plaintiffs and other firms who compete with U S WEST in the competitive segments of the business. In addition, U S WEST correctly states that the terms it offered Qwest are attractive to Qwest precisely because Qwest does not have the goodwill, strong brand name, and marketing apparatus that AT&T,

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MCI, Sprint, Worldcom, and others established by investing in the long distance business and competing on the merits. Each of the foregoing facts establishes that U S WEST is discriminating both among long distance carriers and in favor of U S WEST's own competitive services in violation of the equal access requirements that § 251(g) has codified as FCC regulations.

Second, U S WEST's opposition states that it has signed up 100,000 customers in the few weeks that the program has been in effect. It does not even respond to AT&T's claims that customers who are thus lost may never be regained and that the program is harming AT&T's and the other plaintiffs' reputation and goodwill for these and other related reasons. Indeed, U S WEST does not deny that it has previously argued based on the very case law that AT&T has cited that the foregoing undisputed facts establish irreparable harm.

Third, U S WEST's opposition asserts that the fees it will collect from Qwest merely recover U S WEST's expenses. While this claim is both irrelevant to the legal question on the merits and factually erroneous, U S WEST's assertions assuredly estop it from claiming that it will incur any harm from a preliminary injunction that merely preserves the status quo ante (that prevailed for 14 years) pending a final decision on the lawfulness of its conduct. In the unlikely and virtually impossible event the program were hereafter found lawful, U S WEST could then resume it and recover whatever start up costs it has incurred. As to Qwest, it will remain free to market its long distance services on its own during the interim period and to resume participation in the teaming arrangement if the alliance were somehow later upheld. Thus, a preliminary injunction could cause no cognizable harm to private parties.

Fourth, U S WEST's admissions that it is using its market position to offset advantages that AT&T, MCI, Sprint, and others earned by investing in the long distance business establishes

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that the public interest is served by an injunction. It is the purpose of the antitrust laws, and of the provisions of the Communications Act, to protect competition, not individual competitors, and the use of local monopolies artificially to shift business to favored firms epitomizes the conduct that frustrates the public interest.

Finally, U S WEST devotes much of its memorandum in opposition and two affidavits (Aguilar and Crandall) to arguing that it should not be subject to the prohibitions of §§ 251(g) and 271 and that this Court, it seems, can and should exercise "equitable discretion" by refusing to enforce them. That claim is startling, particularly because it has been expressly rejected by the Supreme Court. See TVA v. Hill, 437 U.S. 153, 193-95 (1978). U S WEST's arguments further rest on factual assertions that are foreclosed by facts it does not address and that are undisputed.

U S WEST's first claim is that it could not use local monopolies to harm long distance competition. See Aguilar Aff., ¶¶ 17-20; Crandall Aff., ¶ 14. But that is just a challenge to Congress's decision to enact §§ 251(g) and 271 and is immaterial. The claim is also contrary to the prior judicial and congressional findings that bind U S WEST and is wrong as a matter of fact. See McMaster Reply Dec., ¶ 27(Exh. 1).

Alternatively, U S WEST asserts that it no longer has a local monopoly. It relies on three facts: (1) the Act has eliminated legal entry barriers, (2) AT&T, MCI, and others are entitled to resell the services and facilities of U S WEST, and (3) some carriers are actually competing with U S WEST. However, U S WEST here ignores other undisputed facts that establish that there is not today and cannot be at any time in the immediate future any alternative to U S WEST's local services for more than a small fraction of the customers in U S WEST territories. See Ward Dec., ¶¶ 3-10 (Exh. 3). Beyond that, U S WEST ignores that § 271(e)(1) of the Act prohibits AT&T, MCI, and other large interexchange carriers from jointly marketing resold local exchange

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services and long distance services until U S WEST is authorized to provide long distance service (or until three years have passed). Thus, the undisputed facts establish that the only entity that can today offer one-stop shopping through packages of local and long distance services to all but a fraction of customers in U S WEST's territories is U S WEST, and that AT&T, MCI, and other large interLATA carriers cannot independently match the package that U S WEST is marketing through its alliance with Qwest.

I. THE TEAMING ARRANGEMENT VIOLATES BOTH SECTIONS 271 AND 251(g) OF THE COMMUNICATIONS ACT

There is, to say the least, a substantial likelihood that plaintiffs will succeed on the merits on each count: the claims that U S WEST is violating § 271 and/or § 251(g). These sections codify provisions of the MFJ that were designed to remove BOCs from providing interexchange telecommunications and, in all events, to require absolute neutrality by BOCs in the relationship between interexchange carriers and their ultimate customers. The U S WEST-Qwest alliance mocks both requirements.

Yet U S WEST now claims that the FCC has held that U S WEST's conduct is lawful under both provisions. However, as explained in detail below, these claims are contradicted by the terms of the orders on which U S WEST relies, by U S WEST's own prior statements, and by the recent public statements of at least two FCC commissioners. Beyond that, whatever the case with § 271, the orders on which U S WEST relies preclude any possible claim that the conduct has been held to satisfy the provisions of § 251(g) that plaintiffs have an explicit statutory right to enforce through injunctive relief (without showing irreparable harm).

Thus, contrary to the claims of U S WEST and its amicus Bell Atlantic, it is besides the point that the MFJ has been vacated, and plaintiffs' claim is not that the MFJ "trumps" the terms

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of a statute. Rather, it is that this statute codifies the judicial interpretation of the MFJ except where it expressly provides otherwise. In turn, that is the reason the FCC has never remotely endorsed U S WEST's claim that §§ 271 or 251(g) permit different results in instances when, as here, the statute does not expressly create exceptions to the prior MFJ precedent. Rather, the FCC has expressly "decline[d] to adopt . . . proposed test[s] that [are] inconsistent with MFJ precedent and difficult to administer." Non-Accounting Safeguards of Sections 271-72, 11 FCC Rcd. 29105, ¶ 115 (1997) (holding that "restrictions imposed by [§ 271] on BOC provision of interLATA services, like the interLATA restriction of the MFJ" prohibit BOCs from providing bundled packages of interLATA and other services).

A. U S WEST IS "PROVIDING INTERLATA SERVICES" IN VIOLATION OF § 271.

While U S WEST has no even superficially plausible response to the claims based on § 251(g), it also could scarcely be clearer that U S WEST here "provides interLATA services" in violation of § 271. First, that is clear from the MFJ precedents, the terms of the Act, and U S WEST's own prior arguments about the meaning of the provisions of the Act on which it now relies. Second, beyond that, even U S WEST's own marketing scripts, internal documents and other statements represent that it is "providing interLATA services." Finally, U S WEST's current claims are barred by the only FCC decisions that address the issue. It is perhaps for this reason that U S WEST's lead argument is the specious claim that plaintiffs are "collaterally estopped" from enforcing § 271.[2]

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[2] U S WEST bases this argument on the fact that some of the plaintiffs intervened in a case where §§ 271-75 of the Act was declared to be unconstitutional "bills of attainders" by a District Court in Texas. Quite apart from the irregularities of that proceeding and the fact that the D.C. Circuit has (in a case where U S WEST intervened) since rejected this same constitutional claim in a challenge to the provision of § 274 that (unlike § 271) re-impose restrictions that had been vacated (BellSouth v. FCC, No. 97-1113 (D.C. Cir. May 15, 1998)), this decision has no

1. U S WEST Is "Providing" InterLATA Services Within The Meaning Of the MFJ Precedents and the Plain Terms Of the Act.

First, U S West is now "providing interLATA services" within the meaning of the MFJ precedents, and this prohibition is codified verbatim in § 271.[3] No other provision of the Act alters the established meaning of the word "provide" in § 271. Indeed, under the MFJ precedents, U S WEST's conduct would be unlawful even if it were the case -- as it is not -- that all U S WEST were now doing was marketing the interLATA services of an unaffiliated carrier. Further, U S WEST is also doing precisely what was held unlawful in United States v. Western Electric, 627 F.Supp. 1090 (D.D.C. 1986): it is selecting purportedly low-cost distance carriers and marketing their services as part of a package that includes other U S WEST services -- all in exchange for a flat fee.

Marketing Is "Providing." The short answer to U S WEST is that the MFJ precedents establish that to market or sell something is to "provide" it. In particular, the original version of the MFJ had prohibited BOCs from manufacturing or providing not only "telecommunications equipment" but also "customer premises equipment" ("CPE") (e.g., personal computers and telephone sets). That latter prohibition on providing equipment would have prevented each individual BOC from selling or leasing an unaffiliated firm's equipment under that firm's brand

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collateral estoppel effect in this case. The reason is that the District Court stayed its judgment over the protests of BOCs who then correctly stated that a stay would mean they could be enjoined from "providing interLATA services" pending a final appellate decision. In this regard, the cases U S WEST cites are inapposite because they hold only that, under res judicata, a stay does not permit a losing party to bring a second action collaterally to attack the earlier judgment.

[3] The only difference is that the MFJ used the term "interexchange," whereas § 271 uses the term "interLATA". However, here Congress was following judicial interpretations of the MFJ, for the courts adopted the terms "LATA" and "interLATA" to avoid confusion with the technical meanings of the terms "exchange" and "interexchange" in state telephone regulation. United States v. Western Electric, 569 F.Supp. 990, 992-94 & n.4 (D.D.C. 1983).

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to anyone located anywhere in the country even when the BOC had nothing whatever to do with the design, development, or fabrication of the equipment and was acting as a pure sales agent.

In response to the claims of a manufacturer who wanted to use BOCs as a distributor of its customer premises equipment (Tandy), the district court directed that the proposed decree be modified to permit BOCs to "market," but not "manufacture," customer premises equipment. United States v. AT&T, 552 F. Supp. 131, 192-93 (D.D.C. 1982). To implement this distinction, the court modified the decree by adding a new Section VIII(A) that stated: "Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment." thus establishing that to "market" is to "provide." Id. at 225 (emphasis added)). The D.C. Circuit subsequently agreed that this language allowed BOCs only to "market" CPE. (United States v. Western Electric, 12 F.3d 225, 231 (D.C. Cir. 1993)).

Similarly, because the MFJ continued to prohibit BOCs from either "providing" or "manufacturing" telecommunications equipment, a BOC could not "market" unaffiliated manufacturers telecommunications equipment. Thus, the MFJ court later held that it was a violation of the MFJ's ban on providing telecommunications equipment for a BOC to market or otherwise sell an unaffiliated firm's telecommunications equipment under the unaffiliated firm's own brand and with the BOC acting purely as a sales agent. United States v. AT&T, CA No. 82-0192 (D.D.C. Apr. 11, 1995) (attached as Exhibit 6 to AT&T's Opening Brief).[4] The MFJ court similarly held that the terms "provide" and "providing" had the same meaning wherever they

[4] Contrary to U S WEST's claims, the fact that the BOC also made an "endorsement of quality" was a separate violation of the MFJ's nondiscrimination provisions.

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were used in the Decree and that the MFJ's ban on "providing" interLATA services was also a prohibition on "furnishing, marketing, or selling" the service. Id., 675 F.Supp. at 665-66.

Notably, all the foregoing provisions and distinctions are now codified in the Communications Act. Section 273 prohibits a BOC from manufacturing or "providing" telecommunications equipment, thereby barring any form of marketing or selling of this equipment. It further authorizes a BOC to provide, but not manufacture, CPE, thereby only allowing the sale or marketing of these products. Because § 271(a) also contains a prohibition on "provid[ing]" a service, it too applies to any marketing or sales activities. As U S WEST correctly states, "when the same term appears in different parts of a statute, the term was intended to have the same meaning in both places." U S WEST Mem. p. 23 (citations omitted).[5]

These points are confirmed by the legislative history of § 271. The Conference Report stated that § 271 was intended to prohibit a BOC from "offering interLATA service within its region" prior to obtaining authorization from the FCC unless the services are specifically authorized by the other subsections of § 271. H.R. Conf. Rep. 104-458, p. 147.

The Other Provisions Of The Act Confirm That "Marketing" Is "Providing." Further, other provisions of the Act confirm that Congress understood that BOCs could not market any services or products that they are prohibited from providing unless the Act expressly authorized this activity. Indeed, U S WEST's contrary claims are inconsistent with its arguments it made after the 1996 Act was passed and by the provisions of § 274.

[5] In this regard, it is only in § 273 and not in § 271 that Congress overruled the related holding that a BOC cannot receive any royalty or other payments that are tied to the success of a firm engaged in a business from which BOCs are barred. Compare United States v. Western Electric, 12 F.3d 225, supra, with § 273(b)(2)(B).

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The primary claim in U S WEST's Opposition (as in the memorandum previously posted on its Web pages) is based on § 272(g)(2). It authorizes a BOC to market or sell any interLATA information or other services provided by the separate affiliate required by § 272 only after the BOC receives authority under § 271 to provide all interexchange services originating in the particular state. U S WEST claims that this provision establishes that Congress intended that BOCs could market the interLATA services of non-affiliated firms before they are generally authorized to provide interLATA services. However, as § 272(g)(3) establishes, Congress authorized a BOC's marketing of its affiliate's service because it recognized that this activity would otherwise constitute a BOC's discrimination in favor of its affiliate in violation of § 272(c). AT&T Br., pp. 22-23. Section 272(g) does not remotely nullify other provisions of the Act (e.g., § 271 or § 251(g)) that prohibit a BOC from marketing an unaffiliated carrier's services before it obtains § 271 authority and while its bottleneck monopoly is intact.

Moreover, U S WEST correctly took this very position in a more candid moment after the 1996 Act was passed and before it conceived of the alliance with Qwest. U S WEST then stated that § 272(g)(2) "only" "allows [a BOC] to market and sell its separate affiliate's in-region, interLATA service" once the BOC has been authorized to provide these services and that this provision "does not address at all what a BOC may or may not do with respect to services provided by unaffiliated IXCs [i.e., interexchange carriers." Reply Comments Of U S WEST, CC Docket No. 96-149, p. 18 (Aug. 30, 1996) (Exh. 5). In this regard, when U S WEST previously approached AT&T about similar ventures, AT&T's position was that they would be permissible, if at all, only after in-region interLATA services are authorized for a BOC. See Chakrin Dec. (Exh. 4).

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U S WEST's reliance on Section 274(c)(2)(A) is likewise misplaced. Section 274 shows that when Congress wished to authorize joint marketing with non-affiliates, it did so explicitly. Specifically, Section 274(a) states that a BOC may not "engage in the provision of electronic publishing services" that use its local facilities, but that a separate affiliate that complies with § 274 may do so. Section 274(c)(1), like Section 272(g)(2), then establishes a general prohibition on any form of marketing by the BOC of the services of its electronic publishing affiliate. 47 U.S.C. § 274(c)(1). However, the other terms of § 274 refute U S WEST's suggestion that these provisions establish or imply that marketing the services of unaffiliated entities is permissible and that no further statutory authorization is necessary. For Congress went on expressly to authorize BOC marketing of the services of non-affiliates in § 274(c)(2)(A), subject to certain stringent safeguards. See AT&T Br. at 24.

U S WEST Is Engaged In Selecting InterLATA Services, Packaging Them In Unique Ways, And Other Activities That Independently Establish that It Is "Providing InterLATA Services. Further, U S West is not engaged only in marketing long distance service. It also selected the particular long distance services that it would market on the basis of criteria that U S WEST has established, packaging them with U S WEST's own service, and providing some "customer care" functions in connection with the long distance services its customers receive. In particular, it has stated that it will perform these functions only for long distance carriers who agree to "the same terms to which Qwest has agreed, or with lower long distance rates than Qwest is offering." U S WEST Public Policy Web Page, pp. 2, 3 (AT&T Br., Exh. 4). These carriers must thus (1) satisfy certain minimum service standards that U S WEST established, (2) offer service at or below prices that U S WEST establishes, (3) allow U S West to offer their long distance service in a package with U S West's local, intraLATA toll service,

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